Supreme Court of the United States

OCTOBER TERM, 1944

MANHATTAN LIGHTERAGE CORPORATION,

Petitioner,

against

ERNEST ANDERSON, et al.,

Respondents.

BRIEF IN SUPPORT OF THE PETITION

The opinion of the District Court (R. pp. 23-27) has been reported at 57 F. Supp. 218, *sub. nom., Arnesen, et al.* v. *Manhattan Lighterage Corporation, Johnson, et al.* v. *same.* The opinion of the Circuit Court of Appeals (R. Vol. B, pp. I-VII) has been reported at ..... F. (2d) .....

POINT I

Respondents are seamen—their duties are maritime in character and are rendered primarily on vessels in commerce in navigable waters.

As appears from the undisputed allegation of paragraph Fifth of the complaint, the craft upon which respondents are employed are vessels (R. Vol. A, p. 5), and these vessels are documented (*supra*, p. 5).

"Seaman" is a term of broadest import. "The word 'seaman' has a plain, ordinary, meaning universally applied. Whether a person is a seaman depends upon the character of his duties. If they are maritime in character and rendered on a vessel in commerce in navigable waters, he is a seaman." *Gale* v. *Union Bag & Paper Corporation,* 116 F. (2d) 27 (C. C. A. 5), cert. den. 313 U. S. 559.

The statutes with exemption provisions comparable to that in the Fair Labor Standards Act have contained slightly varying descriptions of the particular class of maritime employees excluded from coverage. Under the Longshoremen's and Harbor Workers' Compensation Act of 1927, and the Social Security Act, exemption is based upon the term "member of a crew". Coverage of the Merchant Marine Act depends upon whether or not the particular employee is a "seaman", which term defines the limitations of the Fair Labor Standards Act. Of the two exemptions, the courts have held that "seaman" is the more comprehensive. *DeWald* v. *Baltimore & O. R. Co.,* 71 F. (2d) 810, 813 (C. C. A. 4); *Nogueira* v. *New York, New Haven & Hartford Railroad Co.,* 281 U. S. 128; *Carumbo* v. *Cape Cod S.S. Co.,* 123 F. (2d) 991; *International Stevedoring Co.* v. *Haverty,* 272 U. S. 50.

In *Ellis* v. *United States,* 206 U. S. 246, a statute related "to the Limitation of the Hours of Daily Service of Laborers and Mechanics Employed upon the Public Works of the United States and of the District of Columbia", and did not expressly exclude seamen. This Court (Holmes, J.) held that employees on scows and floating dredges were seamen, not "laborers and mechanics" and, therefore, exempt from the eight hours' limitation, saying:

> "But the argument does not stop with masters of tugs, or even with mates, engineers and firemen of the

same. *Wilson* v. *The Ohio,* Gilpin, 505; *Holt* v. *Cummings,* 102 Pa. St. 212. The scows and floating dredges were vessels. Rev. Stat. §§ 3, 4612. They were within the admiralty jurisdiction of the United States. *The Robert W. Parsons,* 191 U. S. 17. (A number of cases as to dredges in the Circuit and District Courts are referred to in *Brown Hydraulic Dredging Co.* v. *Federal Contracting Co.,* 148 Fed. Rep. 290.) Therefore all of the hands mentioned in the informations were seamen within the definition in an earlier statute of the United States. Rev. Stat. § 4612; *Saylor* v. *Taylor,* 77 Fed. Rep. 476, S. C. 23 C. C. A. 343. See also Act of March 3, 1875, c. 156, § 3; 18 Stat. 485; *Bean* v. *Stupart,* 1 Dougl. 11; *Disbrow* v. *The Walsh Brothers,* 36 Fed. Rep. 607. They all require something of the training and are liable to be called upon for more or less of the services required of ordinary seamen. The reasons which exclude the latter from the statute apply, although perhaps in a lesser degree, to them. Whatever the nature of their work it is incident to their employment on the dredges and scows as in the case of an engineer or coal shoveller on board ship" (259-60).

The term "seaman" or "master or member of a crew" has been held to embrace, among others, the following employees: A cook (*Allen* v. *Hallett,* 1 Fed. Cas., p. 472); a fireman (*The North America,* 18 Fed. Cas., p. 339); a fireman on a lighter (*Cassaretakis' Case,* 289 N. Y. 119); an employee on a dredge (*Saylor* v. *Taylor,* 77 Fed. 476, C. C. A. 4); a wireless operator (*The Buena Ventura,* 243 Fed. 797, 2nd case); a carpenter (*Kuhlman* v. *W. & A. Fletcher Co.,* 20 F. (2d) 465); (*Rogosich* v. *Union Dry Dock & Repair Co.,* 67 F. (2d) 377); a horseman* (*United States* v. *Atlantic Transport Co.,* 188 Fed. 42); a deckhand and a diver on a scow (*De Gaetano* v. *Merritt & Chapman Derrick & W. Co.,* 203 App. Div. 259); a watchman (*Grimberg* v. *Oriental S.S. Line,* 300 Fed. 619); a pilot (*The Mary*

* Employed on ship to care for horses carried on the voyage.

Elizabeth, 24 Fed. 397); a cooper (*United States* v. *Thompson,* 28 Fed. Cas., p. 102); a hand on a river boat (*Martin* v. *Acker,* 16 Fed. Cas., p. 884); a surgeon, porter and chambermaid (*Meyer* v. *Dollar S.S. Line,* 43 F. (2d) 425); an employee on a derrick-hoist (*The Sallie,* 167 Fed. 880); an engineer on an unregistered motor boat (*The Virginia Belle,* 204 Fed. 692); a barge captain on a non-self-propelled barge (*Norton* v. *Warner Co.,* 321 U. S. 565); lighter captains on non-self-propelled lighters (*United States Lighterage Co.* v. *Jane M. Hoey,* 142 F. (2d) 484, C. C. A. 2); a caretaker on a barge (*Tucker* v. *Norton,* 56 F. Supp. 61).

The following have been held seaman and entitled to a lien against the vessel for wages:

An orchestra owner on an excursion scow (*The Sea Lark,* 14 F. (2d) 201; W. D. Wash.); a bargee engaged to load and unload a brick barge (*Disbrow, et al.* v. *Walsh Brothers,* 36 Fed. 607); a bartender (*The J. S. Warden,* 175 Fed. 314); a sealer on a fishing vessel (*The Ocean Spray,* 18 Fed. Cas., p. 558); a person operating engine of a pile driver on a freight boat (*Lawrence, et al.* v. *Flatboat,* 84 Fed. 200, aff'd p. c. 86 Fed. 907); a watchman (*Grimberg* v. *Admiral Oriental S.S. Line,* 300 Fed. 619); a wireless operator (*The Buena Ventura,* 243 Fed. 797, 2nd case); an employee on a steam dredge (*Saylor* v. *Taylor,* 77 Fed. 476).

In *Disbrow* v. *Walsh Brothers,* 36 Fed. 607 (*supra*), the Court said:

> "The chief part of their work was loading and unloading the cargo. To quit work as they did was to subject the barge to the liability of special expenses,

whether she undertook to get other persons to supply the libelants' places, or undertook to discharge without their aid, and thereby lose two days' time" (608).

In *Lawrence* v. *Flatboat,* 84 Fed. 200 (*supra*), the Court said:

"Any service is maritime if substantially to be performed on water within the ebb and flow of the tide. * * * The proctor for claimant practically concedes this proposition, but his contention is that the libelants were not seamen, and performed no, or but little, maritime services on the boat. * * * While it is true that the navigation of the boat from place to place in the bay was only incidental to the work of erecting the bulkheads, which was the main object of her employment, * * *, I cannot agree with the able proctor in the conclusion that the work done and the services rendered were not maritime in their character and created no lien upon the vessel. The work done by the vessel related to and was an aid to navigation and commerce, and the services rendered by the libelants were rendered in the special business of the vessel and in furtherance of the work in which she was engaged" (201-202).

In *Saylor* v. *Taylor,* 77 Fed. 476, C. C. A. 4 (*supra*), the Court said:

"If this craft, this movable thing, capable of being transported on the water, and engaged in a work incidental to navigation, in shovelling mud and removing it by water, is a vessel, then she comes within the maritime jurisdiction, and the persons employed on her in that work are seamen, and the lien on the vessel for wages is correlative" (477).

The cases holding that workmen employed on barges and other non-self-propelled vessels are entitled to maritime liens have been held "peculiarly applicable" in construing the Fair Labor Standards Act. *Gale* v. *Union Bag & Paper Corporation,* 116 F. (2d) 27, 28, cert. den. 313 U. S. 559.

POINT II

The legislative history supports petitioner's contention that respondents are seamen within the meaning of the Fair Labor Standards Act.

(a) The Fair Labor Standards Act of 1938 became a law at a time when the meaning of comparable terms of exclusion in other remedial statutes had been crystallized by decisions in the Federal courts.

In the Merchant Marine Act of 1920, Sec. 33, 41 Stat. 988, 46 U. S. C. 688 (popularly known as the Jones Act), coverage was extended to "any seaman". In *International Stevedoring Co.* v. *Haverty*, 272 U. S. 50 (1926), this Court held that "seaman" included any person employed in "maritime work in navigable waters" and that a stevedore was such an employee.

Coverage of the Longshoremen's and Harbor Workers' Act, 1927 (33 U. S. C. 901, *et seq.*), was made dependent on whether the employee is "a master or member of a crew of any vessel." In *DeWald* v. *Baltimore & O. R. Co.*, 71 F. (2d) 810 (C. C. A. 4) (1934), the Court held that a bargee was not "a master or member of a crew" within the meaning of the Longshoremen's and Harbor Workers' Compensation Act. In reaching this result the Court said:

> "It is to us reasonably clear that Congress intended to except from the benefits of the Longshoremen's Act only those persons ordinarily and generally considered as seafaring men, at least only those employed on board a vessel having a master and crew. It is significant that Congress did not use the term 'seaman' in section 3 of the act (33 U. S. C. A. § 903). It would, undoubtedly, have used that term had it intended to exclude from the benefits of the act all those who have been held by the courts to be seamen in the more liberal interpretation of the term" (813).

It is apparent that in 1937 and 1938 when Congress was called upon to choose language to define the class of maritime employees to be excluded from coverage of that Act, the distinction between "seaman" and "master or member of a crew" had been clearly drawn. It must be assumed that this distinction was recognized by Congress and that in selecting "seaman", it intended a different result than if it had chosen "master or member of a crew".

In *Gale* v. *Union Bag & Paper Corporation*, 116 F. (2d) 27 (C. C. A. 5), cert. den. 313 U. S. 559, the Court, in holding that a barge tender employed on a non-self-propelled barge was a seaman within the meaning of Section 13 (a) (3) of the Fair Labor Standards Act, recognized, with conclusion implicit that like limitation did not pervade the meaning of "seaman" under the Fair Labor Standards Act, that Congress in selecting the language "master or member of a crew" as the term of exemption under the Longshoremen's and Harbor Workers' Compensation Act intended to exclude an employee "who might be considered a seaman within the ordinary meaning of the word * * *" (28). The Court adopted the broadest possible interpretation of "seaman" by referring to *International Stevedoring Company* v. *Haverty*, 272 U. S. 50, and the definition of "seaman" under the Merchant Seamen's Act which provides that any person is a seaman "who shall be employed or engaged to serve in any capacity, on board a '* * * vessel belonging to a citizen of the United States'" (46 U. S. C. A. 713), and the equally broad definition under the Public Health Law (18 Stat. 485, 24 U. S. C. Sec. 1).

It was proper appreciation of this construction without guidance of the decision in *Norton* v. *Warner Co.*, 321 U. S. 565, that led the District Court in *Berwind-White Coal*

Mining Co. v. *Rothensies,* 45 F. Supp. 55, to hold that barge and lighter captains did not have the status of "member of a crew". As said by the District Court in the *Berwind-White case* (45 F. Supp. 55, 60):

> "I fail to see how the plaintiff's case is helped by the decision in *Gale* v. *Union Bag & Paper Corp.,* supra, since all of the cases referred to clearly indicate that Congress intended 'seamen' to have a broader connotation than 'officers or members of a crew'."

Other recent decisions have recognized that "seamen" is a term at least as broad if not broader than "master or member of a crew". In *Norton* v. *Warner Co.,* 321 U. S. 560, this Court said:

> "'Seamen' as used in a particular context may of course have a broader meaning than 'crew'. *International Stevedoring Co.* v. *Haverty,* 272 U. S. 50, and see *Carumbo* v. *Cape Cod S.S. Co.,* 123 Fed. (2d) 991."

As the Court said in *Carumbo* v. *Cape Cod S.S. Co.,* 123 F. (2d) 991 (C. C. A. 1):

> "While courts have sometimes used the expressions 'seaman' and 'member of a crew' interchangeably, *Moore Dry Dock Co.* v. *Pillsbury,* 9 Cir., 1938, 100 F. 2d 245; *Diomede* v. *Lowe,* 2 Cir., 1937, 87 F. 2d 296, it is well established that the word 'seaman' under the Jones Act does not mean the same thing as 'member of a crew' under the Longshoremen's Act. 'Seamen' is broad enough to cover both one who is a 'member of a crew' and one who is not a 'member of a crew' (p. 994).

(b) The benefits reserved to seamen under the General Maritime Law offset the usual assumption that exemptions in remedial statutes are to be narrowly construed.

The cases heretofore considered demonstrate beyond any doubt that appellants are entitled to maritime liens as security for wages and that they may sue under the Jones Act.

The existence of these privileges has been regarded as "peculiarly applicable in construing the Act". *Gale* v. *Union Bag and Paper Corp.*, 116 F. (2d) 27 (*supra*), at page 28. Also appellants as employees on American vessels may obtain free treatment at marine hospitals (24 U. S. C., Sec. 1), and they are entitled to maintenance and cure.

The importance of these privileges, in construing the comparable but more restricted exemption terminology of "master or member of a crew" within the meaning of the Longshoremen's and Harbor Workers' Compensation Act, was recognized in *Norton* v. *Warner Co.*, 321 U. S. 560 (*supra*), this Court saying:

> "On the other hand, those who are not covered by it [Longshoremen's and Harbor Workers' Act] but who are protected by maritime law are entitled to maintenance and cure, a remedy not restricted to accidents. As we said in *Aguilar* v. *Standard Oil Co.*, 318 U. S. 724, 732, 'In this respect it is a broader liability than that imposed by modern workmen's compensation statutes.' Moreover, seamen may sue under the Jones Act (41 Stat. 988, 1007, 46 U. S. C. § 688) for injuries in the course of their employment, and in such actions assumption of risk is no defense. *Socony-Vacuum Oil Co.* v. *Smith*, 305 U. S. 424. Suit may be brought in admiralty for injuries caused by unseaworthiness of the vessel or its appurtenant appliances and equipment. *Mahnich* v. *Southern Steamship Co.*, 321 U. S. 96, and cases cited. These are basic rights" (570-71).

(c) The hearings on the Black-Connery Bill, as well as legislative debate indicate that the term "seaman" as used in Section 13 (a) (3) of the Act was not intended to have a restricted meaning.

On May 24, 1937, President Roosevelt in an address to a joint session of Congress urged that the Congress enact legislation to improve wage and hour conditions of workers on farms and in industries which in general terms may be

described as engaged in production of goods. The text of this message in part is as follows:

> "Today, you and I are pledged to take further steps to reduce the lag in the purchasing power of industrial workers and strengthen and stabilize the markets for the farmers' products. The two go hand in hand. Each depends for its effectiveness upon the other. Both working simultaneously will open new outlets for productive capital. * * *."

And, concluding the message, the President said:

> "Legislation can, I hope, be passed at this session of Congress further to help those who toil in factory and on farm. We have promised it, we cannot stand still" (See 81 Cong. Rec. 6894).

On the same day that this message was delivered, identical bills were introduced in the House and Senate which jointly were known as the Black-Connery Bill, taking its name from the Senate and House sponsors thereof. After much debate, Congress ultimately excluded agricultural laborers from the bill.

When the bill was drawn, there was no express exemption of seamen, although the chairman of the Joint Committee,* Senator Black, said:

> "I do not believe that bill (S. 2475), as written covers the seamen, although there may be a question about it." **

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* Joint Hearings before the Committee on Education and Labor (Senate) and the Committee on Labor (House) on S. 2475 and H. R. 7200, 75th Congress, 1st Session, pp. 1216-1217.

** This statement suggests *Ellis* v. *United States*, 206 U. S. 246, where Holmes, J., held that seamen (employees on scows and floating dredges) were not covered by a statute relating to "the Limitation of the Hours of Daily Service of Laborers and Mechanics Employed upon the Public Works of the United States and of the District of Columbia", even though there was no express exemption.

At the Joint Hearings, E. R. Howell submitted the following statement in behalf of the Sailors' Union of the Pacific:*

> "In this connection, I would refer you to the Social Security Act for legislative precedent. By specific language, seamen are excluded from participation in that benefit.**
>
> To further emphasize the point, I would refer you to section 2(a), subsection 7, of the proposed act, wherein certain exclusions are listed, among them agricultural laborers. Seamen are not mentioned, and it can be presumed, and it indeed is the opinion of some authorities that seamen could be included in the definition of 'employee' as set out in section mentioned.
>
> However, it is our honest opinion that the purpose of the law is to make provision for the prevention of unfair labor practices in industries not already covered by law, particularly in industries engaged in the production of commodities and goods. This conclusion would seem to be borne out by the exception of agricultural laborers from the definition of 'employee' in the proposed act. I would point out that so far as the seamen are concerned, they are not engaged in production; rather they are part of the 'carrier' system.
>
> But the bill is not clear on that point, and in our opinion, it should be made so."

Mr. Howell referred to Maritime Commission control of wages of seamen employeed on subsidized vessels, but he first pointed to the authority previously existing in the National Labor Relations Board to adjust seamen's wage disputes, and stated that to authorize control over seamen's

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* Joint Hearings before the Committee on Education and Labor (Senate) and the Committee on Labor (House) on S. 2475 and H. R. 7200, 75th Congress, 1st Session, pp. 1216-1217. This statement is set out in full in the Appendix to this supporting brief, *infra*, pp. 35-38.

** This statement does not support the conclusion of the Circuit Court of Appeals below that the exclusion of "officers or members of a crew" within the meaning of the Social Security Act, as extended by administrative regulation, is broader than the "seaman" exemption under the Fair Labor Standards Act (R. Vol. B, p. V).

wages under the Fair Labor Standards Act "would overlap the duties and authority of the National Labor Relations Board". Respondents are as much subject to the jurisdiction of the National Labor Relations Board as are any other seamen.

Concluding his statement, Mr. Howell said:

> "Our union does not like to see any further or additional legislation enacted to cover a group of workers already so well covered, which might tend to create some confusion in labor relations, which are now on the road to practical and successful operation."

In this spirit, petitioner has conducted its business and by collective bargaining has worked out with respondents agreements as to wages and hours best suited to the unusual conditions of transportation by water and lighterage of cargo. Not until March of 1945 when the Administrator of the Wage and Hour Division, by his attorneys, petitioned the Circuit Court of Appeals for leave to file a brief *amicus curiae* was there any suggestion from the Department of Labor that petitioner's employees on its lighters and barges were considered as non-exempt.

Ralph Emerson, appearing in behalf of the National Maritime Union,* also requested that seamen be expressly exempted partially on the ground that the seamen whom he represented, at least those employed on subsidized vessels, were subject to wage and hour control by the Maritime Commission.**

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* Joint Hearings before Committee on Education and Labor (Senate) and Committee on Labor (House) on S. 2475 and H. R. 7200, 75th Congress, 1st Sess., pp. 544-549.

** Colonel Kenneth Gardner, testifying before the House Merchant Marine Committee on March 6, 1945, stated in response to question by Representative Weichel (Rep., Ohio) that before the war there were only 150 subsidized ships. The Journal of Commerce, March 7, 1945, p. 18.

Following the Joint Hearings and when the Bill was reported back to the Senate, Senator Black, in referring to the present Section 13(a) (3) exemption stated that the bill was written in such a way as to exclude "maritime workers" from coverage (81 Congressional Record 7875). The term "maritime workers", the broadest possible description of the exemption, is in harmony with the purpose of the Act as outlined by President Roosevelt, as well as the understanding of Mr. Howell, that the bill did not apply to transportation workers with or without express exemption.

Statements by other Senators made in debate on the bill throw light on the "seaman" exemption. In discussing this exemption and that in Section 13 (a) (5), Senator George said:

> "Seamen, people who take sponges and fishes from the ocean and from other waters are not within the bill" (81 Cong. Rec. 7784).

Senator Bridges, speaking generally of exemptions in the statute, said:

> "Occupations exempted: The Black bill exempts executive, administrative and professional employees, persons engaged in local retailing, seamen, railway workers, and persons employed in fishing and agriculture" (81 Cong. Rec. 7792).

Nowhere is there a single statement to the effect that the term "seamen" should be given anything but its long-accepted meaning. We submit that proper construction is that adopted by the Fifth Circuit in *Gale* v. *Union Bag and Paper Corporation*, 116 F. (2d) 27, cert. den. 313 U. S. 159:

"The word 'seaman' has a plain, ordinary meaning universally applied. Whether a person is a seaman depends upon the character of his duties. If they are maritime in character and rendered on a vessel in commerce, in navigable waters, he is a seaman" (pp. 27-28).

POINT III

This case calls for an exercise of this Court's power of supervision.

By disregarding the settled meaning of the seaman exemption and by adopting a new and artificial line between seamen and non-seamen within the meaning of the Fair Labor Standards Act, the Court below has destroyed the simple and precise definitions in reliance upon which companies like petitioner have for years conducted their businesses. Moreover, the opinion of the Circuit Court of Appeals, following its own views as to desirable coverage of the Act, has clearly substituted its wisdom for that of Congress in determining whether or not these seamen should be exempt. Respondents unquestionably are seamen, regardless of whether or not they have substantial duties in connection with cargo. Petitioner submits that the Circuit Court of Appeals has committed errors so serious in its effort to *establish* the law of this exemption as to call for an exercise of the corrective jurisdiction of this Court by writ of certiorari.

That there is no jurisdictional bar to reviewing an order of remand is now well settled. *American Seating Co.* v. *Zell*, 322 U. S. 709; *Gay* v. *Ruff*, 292 U. S. 25, 28-31.

CONCLUSION

It is respectfully submitted that the writ of certiorari prayed for should be granted to the end that this action may be reviewed and determined by this Court; and the order of the Circuit Court of Appeals be reversed; and that your petitioner be granted such other and further relief as may seem proper.

CHAUNCEY I. CLARK,
HERBERT M. LORD,
Counsel for Petitioner.

New York, N. Y.
June 6, 1945.